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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 388

CITY OF CORAL GABLES, A MUNICIPAL CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF FLORIDA,

Petitioner,

vs.

ED. C. WRIGHT, DOING BUSINESS AS ED. C. WRIGHT & COMPANY, SUCCESSOR TO ED. C. WRIGHT & COMPANY, INC., AND AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE, A NATIONAL BANKING CORPORATION,

Respondents.

BRIEF OF PETITIONER IN SUPPORT OF WRIT OF CERTIORARI.

Official Report of Opinions in Courts Below.

The opinion of the United States Circuit Court of Appeals, Fifth Circuit, is officially reported as *Wright, et al.*, v. *City of Coral Gables, Florida*, 137 F. 2d 192 (R. 1860). The opinion and the interlocutory decree of the District Court of the United States, Southern District of Florida, Miami Division, are not officially reported (R. 1773, 1829).

Grounds of Jurisdiction of Supreme Court.

The jurisdiction of this Court is invoked under the Federal statute authorizing and permitting a municipal corporation to file a petition in bankruptcy. The sections of the Federal statute which petitioner, City of Coral Gables, Florida, invokes are sections 81-84 of Chapter IX of the Bankruptcy Act of August 16, 1937, 50 Statutes 654, as amended by the Act of June 22, 1938, 52 Statutes 940, 11 U. S. C. A., sections 401-404. The appeal below was taken by the appellants under 11 U. S. C. A., section 47. The writ of certiorari in this case is authorized by section 240(a) of the Judicial Code, as amended, 28 U. S. C. A., section 347(a).

Statute Involved.

The statute involved is the said Municipal Bankruptcy Act, and in particular the following subparagraphs of section 83 (11 U. S. C. A., section 403), reading as follows:

> (e) "* * * At the conclusion of the hearing, the judge shall make written findings of fact and his conclusions of law thereon, and shall enter an interlocutory decree confirming the plan if satisfied that * * * (5) the offer of the plan and its acceptance are in good faith;"
>
> (j) "The partial completion or execution of any plan of composition as outlined in any petition filed under the terms of this title by the exchange of new evidences of indebtedness under the plan for evidences of indebtedness covered by the plan, whether such partial completion or execution of such plan of composition occurred before or after the filing of said petition, shall not be construed as limiting or prohibiting the effect of this title, and the written consent of the holders of any securities outstanding as the result of any such partial completion or execution of any plan of composition shall be included as consenting creditors to such plan of composition in determining the percentage of securities affected by such plan of composition."

July 1, 1898, c. 541, sec. 83; Aug. 16, 1937, c. 657, 50 Stat. 655; June 22, 1938, c. 575, sec. 3(b), 52 Stat. 940, 11 U. S. C. A., sec. 403(j).

Subsection (j) was approved June 22, 1938, and took effect September 22, 1938. Chapter 575, sec. 7, 52 Stat. 940.

Statement of Case.

This is a proceeding in bankruptcy, instituted by the petitioner, City of Coral Gables, a municipal corporation of the State of Florida, hereinafter called the "City," for the confirmation of a plan of composition of its bonded and certain other indebtedness, over 90% of which indebtedness had been refunded by voluntary agreement with most of its creditors approximately 3 years prior to the filing of the petition.

The constitutionality of section 83(j) has been passed upon by this Court in its denial of the petition for writ of certiorari in the cases of *American National Bank of Nashville, Tennessee* v. *City of Sanford, Florida*, 5 Cir., 112 F. 2d 435, certiorari denied, 311 U. S. 677, 85 L. Ed. 436, 61 S. C. 45; and *Davis* v. *City of Homestead*, 5 Cir., 112 F. 2d 438, certiorari denied, 311 U. S. 678, 85 L. Ed. 436, 61 S. C. 45. The constitutionality of subsection 83(j) of said Act is not questioned in this case.

This case presents questions involving the interpretation and application of subdivisions (e)(5) and (j) of section 83 of the Municipal Bankruptcy Act to the particular plan of composition under the particular state of facts as shown by the record.

On June 27, 1940, proceeding under the authority of Ordinance No. 347 (R. 108), adopted March 5, 1940, the City of Coral Gables, Florida, filed a petition (R. 1) in the District Court of the Southern District of Florida, under the said Municipal Bankruptcy Act, for the purpose of obtaining the approval of a plan of composition which in effect would require a minority, who had refused to settle on the proposed

terms, to accept refunding securities of the same character and nature as had been accepted previously by 90% of its creditors of the same class. Copies of Ordinance No. 347 (R. 108), adopted March 5, 1940, Ordinance No. 269 (R. 57), adopted December 23, 1936, and Ordinance No. 289 (R. 96), amending Ordinance No. 269, adopted September 4, 1937, are attached as exhibits to the petition. The changes in the plan by the amending ordinance do not affect any of the questions presented in this case.

Said Ordinances 269 and 289 constitute the plan of composition and provide that each creditor should receive refunding bonds in amounts equal to 50% of the principal of his claim and tax participation certificates for the other 50% of the principal plus all unpaid interest to January 1, 1937 (R. 62).

The refunding bonds pledge the full faith and credit of the City of Coral Gables and are general obligations of the City, while the tax participation certificates merely evidence the right of the holders to participate ratably in the Tax Participation Certificate Fund (R. 79). The plan of composition provides that certain minimum annual debt service tax levies shall be made in accordance with a schedule set forth in said plan, and the proceeds from such tax levies shall be paid into the "Issue of January 1, 1937 Fund" (R. 72), and the plan pledges the said fund, 1st to the payment of interest on refunding bonds, 2nd to the creation of a "Sinking Fund" according to a fixed schedule for the retirement of the refunding bonds (R. 72), and 3rd, any surplus over and above the first two requirements is required to be paid into the "Tax Participation Certificate Fund" and annually distributed on a pro rata basis to the holders of such certificates (R. 78).

The plan of composition provides in section 12 (R. 87-9), that, in consideration of the creditors waiving and relinquishing all of their right to participate in the proceeds

of the liquidation of delinquent tax assets represented by delinquent taxes and special assessments imposed prior to January 1, 1936, the City would, over a period of ten yeras, acquire and cancel $500,000.00 of refunding bonds, and that, if the City did not acquire and cancel refunding bonds according to said schedule each year, then it would be obligated in the next year to levy special taxes to raise funds for the purpose of purchasing refunding bonds to carry out this retirement schedule. It further provides that, if such tax assets were sold during the calendar year 1937, the City would be under no obligation to apply the proceeds to the purchase of refunding bonds, and proceeds received that year were not pledged in any manner to the servicing of refunding securities.

The plan also provides in section 19 (R. 92), that the City can purchase for its own use and benefit any of its refunding obligations with funds derived from sources of revenue other than those sources pledged to the servicing of the refunding securities under the plan. The funds so pledged are (a) the Issue of January 1, 1937 Fund (R. 72), being the proceeds from the collection of the minimum debt service tax levy required in the plan; (b) the Sinking Fund (R. 74); (c) the Tax Participation Certificate Fund (R. 78); and (d) the $500,000 Fund provided for by section 12 of the plan (R. 87).

Under the plan of composition the future taxing power of the City is the only asset or resource of the City which is pledged unconditionally to the servicing and payment of the refunding bonds and the tax participation certificates authorized to be issued.

Other provisions of the plan of composition will be described hereinbelow where they are pertinent and material to the argument.

The petition shows that at the time of the enactment of Ordinance No. 269, on December 23, 1936, the outstanding

bonded indebtedness of the City amounted to $7,977,000.00 principal and $2,707,902.17 accrued interest (R. 58). The City was also indebted on other obligations incurred prior to November 6, 1934, in the amount of $412,073.90 principal, and $134,317.98 accrued interest (R. 60). All of the said accrued interest and $2,737,473.90 of the said principal bonded and other indebtedness was past due, making a total of $5,530,984.19 past due indebtedness as of January 1, 1937 (R. 11).

The petition shows that when it was filed, on June 27, 1940, the City had outstanding refunding bonds in the amount of $3,478,818.00 and tax participation certificates in the amount of $6,334,004.65 (R. 4-5, 55-56), that it had outstanding and unrefunded (a) old bonds in the amount of $326,000.00 ($65,000.00 of which matured prior to July 1, 1940) with interest accrued to January 1, 1937, in the amount of $118,286.52 (R. 19-41, 55); (b) six judgments with peremptory writs of mandamus requiring special earmarked tax levies over periods of six and twelve years to service the same were premised upon old bonds in the principal amount of $154,000.00, upon which interest had accrued to January 1, 1937, in the amount of $60,298.73 (R. 41-53, 56); and (c) other judgments in the amount of $1,039.93, with interest accrued to January 1, 1937, in the amount of $190.46 (R. 56). The petition also shows that substantial amounts had been paid on account of interest upon said six judgments and on account of interest included in the amount of said judgments (R. 42-53) out of the proceeds of special earmarked tax levies made pursuant to the requirement of the said writs of mandamus.

The petition also shows that the City owned, held and controlled, or had cancelled, refunding bonds in the amount of $475,198.98, and tax participation certificates in the amount of $234,746.92, and that the City had purchased or

acquired said securities for its Sinking Fund or for the use and investment of its funds other than those established by Ordinance No. 269 for the servicing and retirement of the refunding securities of January 1, 1937 (R. 4-5).

Ed. C. Wright and the American National Bank of Nashville, Tennessee, respondents, appellants in the Circuit Court, filed answers and objections to the confirmation of the plan in the district court (R. 136, 145, 171) and opposed the confirmation of the plan and claimed, among other things, that the petition was not filed in good faith and that the plan of composition submitted had been completed and abandoned and was not a partially completed plan within the meaning of section 83(j) of the Municipal Bankruptcy Act.

The case was referred to a special master to take the testimony of the respective parties, and, after the taking of testimony over a period of more than one year, and after extensive argument of counsel, the special master made specific findings of fact and of law on each of the contentions of dissenting creditors and recommended to the District Court that a decree be entered confirming the plan in accordance with his findings of fact and of law (R. 321-335) against the contentions of the dissenting creditors.

Thereafter, upon exceptions (R. 1719, 1726) filed by the respondents, the case was further extensively argued before the district judge, and, after considering the voluminous testimony and report of the master over a period of several months, he confirmed the report of the special master (R. 1773). On November 20, 1942, an interlocutory decree approving and confirming the plan was entered by the district judge (R. 1829).

The respondents appealed to the Circuit Court of the Fifth Circuit, which court reversed the interlocutory decree and remanded the case to the District Court (R. 1872).

The City filed a petition for rehearing in the Circuit Court (R. 1873), which petition was denied by order entered August 12, 1943 (R. 1888).

On September 27, 1943, the City filed its petition for writ of certiorari to the Circuit Court with supporting brief and transcript of record of the proceedings in the Circuit Court, and on November 8, 1943, this Court granted the City's petition and writ of certiorari to the circuit court was issued.

Assignment of Errors to Be Argued.

1. The Circuit Court of Appeals for the Fifth Circuit erred in holding that the petitioner City did not act in good faith in filing its petition in this case for the sole purpose of coercing a small minority of objecting creditors to accept the plan of composition.

2. The Circuit Court erred in its interpretation of section 83(j) in holding in effect that the Municipal Bankruptcy Act is not available to a city "under changed conditions" which have arisen subsequently to a partial voluntary refunding of its debts whether or not such "changed conditions" affect in a similar manner and degree the rights of all creditors, consenting and non-consenting.

3. The Circuit Court erred in reversing the findings of fact made by the special master and the district judge, without such findings appearing to be clearly erroneous.

4. The Circuit Court erred in holding that the plan was not submitted in good faith and is not fair to opposing creditors, and that consents were requested and were to be used to "bludgeon into submission" the non-consenting bondholders.

5. The Circuit Court erred in allowing its decision to turn on statements of alleged facts which do not appear in the

record. There is no evidence in the record to support the statements of the Circuit Court:

(a) That the plan had been carried to completion as such in 1937 by the acceptance of more than the 90% which the plan required to make it effective (R. 1861);

(b) That, when 90% had accepted, the plan was closed and abandoned as to the remaining non-consenting bondholders (R. 1866);

(c) That the present proceeding is an entirely new proceeding and in no proper sense a completion of the partially completed plan (R. 1866);

(d) That the voluntary plan had been accepted in 1937 under an express understanding that bankruptcy would not be resorted to (R. 1864).

6. The Circuit Court erred in assuming that there is lacking in the instant case the identity of interest of the consenting creditors with the non-consenting creditors who will be compelled by the consents and confirmation to accept the plan of composition.

7. The Circuit Court, by holding that the Municipal Bankruptcy Act of August 16, 1937, as supplemented by the addition of section 83(j) by the Act of June 22, 1938, was not intended to extend to the situation presented in this case, erred in deciding an important question of Federal law which has not been, but should be, settled by the Supreme Court.

8. The decision of the Circuit Court in this case conflicts with other decisions of said circuit court and with decisions of other circuit courts.

9. The Circuit Court in this case has decided a federal question in a way probably in conflict with the applicable decisions of this Court.

10. The Circuit Court erred in reversing the judgment of the district court.

ARGUMENT.

Statement of Facts.

(1) Factual Background of the Case.

The City of Coral Gables was incorporated in 1925 and reincorporated in 1929 with a substantially revised charter, which included in the City boundaries approximately 14½ square miles of land area immediately adjoining and to the West and South of the City of Miami, a major portion of which still is unimproved land (R. 1643-4, 1301).

The first subdivisions of what is now known as the City of Coral Gables were opened in 1921, and building was commenced in 1922 before the city was incorporated. The 1930 Federal Census showed a permanent population of 5,697, the State Census of 1935 showed 6,747, and the Federal Census of 1940 showed 8,294 (R. 1436, 620). Winter population has never been exactly determined, but it is estimated for 1940 at from 13,000 to 14,000 (R. 1644, 1301).

The City of Coral Gables is principally a residential suburb of the City of Miami and is one of many such residential sections in the metropolitan Miami area (R. 1645, 1301).

Based upon exaggerated boom-time values, Coral Gables real estate was assessed in 1926 at a value of $90,810,350.00, which was then assumed to be one-half the fair value of the land alone, with no assessment of improvements upon the land. On this predicate and on the expectation of phenomenal growth during 1925, 1926 and 1927, bonds were issued and other obligations incurred to the approximate total amount of $8,750,000.00. The collapse of the real estate boom and the subsequent sharp decline in realty values and tax collectibility placed the City in complete default by the end of 1930. Default continued as to both principal and interest, except for small partial payments

on interest and the retirement of a few obligations by purchase, until the total indebtedness, including past due interest, rose to the sum of $11,182,606.36 as of January 1, 1937 (R. 1647-8, 1301). As of June 30, 1937, $5,746,279.78 of said indebtedness was past due and in default (R. 1429, 388).

The total assessed value of all property in the City subject to taxation on the tax roll for 1937 was $23,684,018.00 (R. 1650, 1301).

Shortly after the default in 1930, the Coral Gables Bondholders Protective Committee, known as the Barker Committee, was organized to represent holders of its defaulted obligations in dealing with the City. This Committee and the City, during these seven years, made independent studies of the City's financial situation and worked on several plans for adjustment but were unable to consummate any of them (R. 407-16, 539).

Prior to the year 1935 there had been only a few suits against the City on its defaulted bonded obligations. In 1935 the Barker Committee filed suit on over two million dollars of defaulted obligations. In 1936 eleven suits were instituted by other creditors against the City on $378,787.50 of its defaulted bond obligations; in 1937 five more suits were filed against the City on $301,872.14 of its defaulted bond obligations, and one suit was filed in 1938 (R. 1422-5, 382).

The efforts of city officials to negotiate a refunding through the Barker Committee, representing bondholders, were virtually at a standstill in 1936, when the City employed Carl L. V. Exselsen as the exclusive representative of the City to negotiate a debt refunding plan in conjunction with the mayor and city commissioners (R. 1519, 842).

His negotiations resulted in the adoption of Ordinance No. 269 on December 23, 1936 (R. 57).

This debt refunding plan was negotiated with the said Barker Committee and other representatives of large groups of bondholders (R. 1415). On February 3, 1937, the Barker Committee signed a contract with the City to refund obligations controlled by it (R. 1477, 842). Early in 1937, the holders of a substantial amount of other outstanding debts signed contracts on the form, dated December 24, 1936, for their refunding under the plan for readjustment (R. 1482, 842). Each of said contracts authorized the creditor to withdraw from the agreement, if the refunding agreed to was not carried out on or before the 1st day of August, 1937 (R. 1481, 1512).

Under these contracts and the plan of adjustment, the City was required to procure a decree of the Supreme Court of the State of Florida validating the refunding securities proposed to be issued. The validation proceeding was not concluded in the Supreme Court until July 30, 1937, and it required an amendment of the plan to make it conform to this decision. *City of Coral Gables* v. *State of Florida*, 128 Fla. 874, 176 So. 40. This amendment to the plan was made by Ordinance No. 289, adopted September 4, 1937 (R. 96). The changes in the plan by this amendment do not affect any of the questions presented in this case.

The City's said contracts with its creditors to accept the plan of adjustment provided that the same could not be put into effect until at least 90% in amount of its creditors had agreed to accept the proposed refunding securities, but the plan did not provide that acceptance by more than 90% would constitute a completion of the plan (R. 1477, 1482, 1514, 842). These contracts did not mention bankruptcy by the City. At the time of their execution there was no law authorizing municipal bankruptcy. Although the present Municipal Bankruptcy Act had been enacted August 16, 1937, the City decided to proceed with the voluntary plan of adjustment, and on September 24, 1937, began the de-

livery of refunding bonds and tax participation certificates in exchange for old bonds and coupons in strict compliance with the terms of the plan, and shortly thereafter consummated the exchange of over 90% in amount of its outstanding indebtedness under the plan (R. 1239). The bonds exchanged with the Barker Committee were less than 50% of the outstanding debts of the City (R. 676). In making the said exchanges the City delivered to the bondholders nothing of value excepting refunding bonds, with matured coupons detached, and tax participation certificates in amounts authorized by the plan, and City checks in lieu of the detached coupons (R. 679-81, 683-4).

The resources of the City pledged under said debt refunding plan to the servicing of the refunding securities are the minimum debt service millage required in section 8 of the ordinance (R. 72), from the proceeds of which would be set up the Issue of January 1, 1937 Fund, the Sinking Fund (R. 74), and the Tax Participation Certificate Fund (R. 78). The City also pledged itself to use under certain conditions the proceeds from the liquidation of delinquent tax assets held by the City for taxes levied prior to January 1, 1936, as provided for in section 12 of the plan (R. 87). The City, under the plan, is also obligated to levy debt service taxes in excess of the minimum millage prescribed, if necessary, for the purpose of servicing the refunding bonds, and it is obligated, in the event it does not carry out the special ten-year program for retirement of refunding bonds required by section 12, to levy a special tax to raise funds for the purpose of carrying out this retirement schedule.

In section 12 it is also provided that the creditors of the City waive and relinquish all of their rights to participate in the proceeds of certain delinquent tax assets in consideration of the City's carrying out the special retirement schedule in said section.

The City sold all of these delinquent tax assets and received payment in cash for the same in October, 1937. The City also sold to the same party at par its delinquent tax liens for taxes levied in 1936 (R. 1517-8, 842). It is the use of these funds in the financial operations of the City, particularly in the purchase by its agent Exselsen of unrefunded obligations, that was complained of by the respondents in the District Court and in the Circuit Court. In purchasing unrefunded obligations, Exselsen acted only as negotiating agent, and did not, as contended by respondents, spend the money of the City as he saw fit (R. 1470, 842).

The moneys used by the City in the purchase of the judgments and the old bonds and coupons were derived from the sale of delinquent tax assets, its general funds and trust funds, and did not come out of any of the funds set aside for the servicing of the refunding securities (R. 326, 1521-9, 842).

In October, 1937, five of the suits against the City on defaulted bonds and coupons had progressed to final judgment, and peremptory writs of mandamus required special earmarked tax levies to service the same. These judgments and the millage required to service them in the year 1937 were as follows (R. 42-50, 1530, 842):

Judgment Creditor	Amount of Judgment.	Millage Required in 1937.
Augustus T. Ashton	$13,771.35	.1515
Fiduciary Counsel, Inc.	130,885.14	1.4184
W. J. Noel	19,365.66	.2287
Leo K. Steiner	14,879.51	.2976
Henry A. Thies	54,802.59	.5838
Totals	$233,704.25	2.6800

The above is a detailed statement of judgments outstanding, but at the same time there were a large number of past

due bonds and matured coupons outstanding in the hands of creditors pressing for payment and threatening to sue the City.

There were also then pending suits by Lois Harmon and C. J. Root, which went to judgment and peremptory writs of mandamus requiring special earmarked tax levies in the year 1938 of .0429 to service the Harmon judgment and .3521 to service the Root judgment. In 1939 G. E. Vallette obtained a judgment and peremptory writ of mandamus, which required the levy in the year 1939 of a special earmarked tax of .08639 mills (R. 1530, 842).

The peremptory writs issued by the court on the above mentioned judgments required the City to pay these judgments in full over a period of six years, except the Root judgment which was spread over twelve years, and the millages listed above were the several millages required to pay the first year's installment on these judgments.

By calculations from defendant's Exhibit 8 (R. 1521, 842), judgments without peremptory writs in 1937 and old bonds which matured on and before July 1, 1938, plus coupons and interest to January 1, 1937, were purchased by the City in the total amount of $261,827.98. Judgments on these claims would have exceeded this amount because they would have included interest after January 1, 1937, to the date of the several judgments. To service these judgments over a period of six years, as was required by the District Court in the other cases, would have required a tax levy in 1938 of over 3 mills.

After fixing the millage in 1937, the City made an agreement with Fiduciary Counsel, Inc., under which it paid $8,000.00 in cash on the judgment and modified the writ of mandamus so as to service the judgment over a period of twelve instead of six years and to reduce the interest to be paid upon the same. This enabled the City to reduce the earmarked special tax levy for this judgment creditor

to .7098 mills. The City also purchased the Leo K. Steiner judgment and the Henry A. Thies judgment, and did not actually have to make the special earmarked levy to service these two judgments. Theses three settlements enabled the City to reduce the earmarkd tax levy millage in 1937 by 1.59 mills (R. 1530, 842).

The earmarked special tax levy made pursuant to existing peremptory writs of mandamus in 1938 was 1.34 mills (R. 1530, 842).

If the City had not used the proceeds from the liquidation of its delinquent tax assets for the years prior to 1936, which were not pledged as security for the refunding securities, in purchasing the above mentioned judgments and in purchasing the old matured bonds and coupons during the period from October 18, 1937, to May 13, 1938, it would have been faced with the almost certain requirement of levying special earmarked tax levies in the year 1938 in the amount of 4.59 mills in addition to the 1.34 mills which was actually levied in that year. Under the plan of refunding a levy of 6 mills in 1938 was to provide for the entire City debt.

The petitioner, City of Coral Gables, used funds which were not pledged to the servicing of the refunding securities to acquire for the account of its bond retirement fund (section 12 of plan) and other trust accounts, obligations against it which, if placed in judgment, along with those that were already in judgment, would have required an increase of its debt service taxes for the year 1938 of almost 100%.

The purchase of these judgments and old outstanding obligations made under the duress of existing federal court judgments and the threat of other such judgments (R. 759), was for the benefit of the City and its taxpayers and for

the benefit of all of its creditors, in that the purchases resulted in saving to the City and its creditors the benefits of the partial voluntary refunding.

On and prior to March 22, 1939, the City had also purchased some of its refunding bonds, with a part of the proceeds from the delinquent tax assets above described, with general funds and with trust funds (R. 1521-9, 842).

All of the unrefunded obligations purchased by the City were converted into refunding bonds and tax participation certificates in amounts authorized by the plan.

In making the purchases shown in defendant's Exhibit 8 (R. 1521, 842) the City was anticipating the requirements of section 12 of the plan (R. 87) and attempting to prevent harmful tax rates and disruption of the refunding program (R. 848). The City allocated the refunding bonds so acquired, except the few purchased and held in specific trust funds, to the cancellation schedule set up in said section 12 (R. 828).

In regard to the above transactions of the City in purchasing old bonds and coupons and judgments on old bonds and coupons and refunding bonds, the special master specifically held that such transactions did not constitute an abandonment of the plan of refunding and that they were a bona fide effort on the part of the City to accomplish a 100% completion of its refunding plan (R. 325-8).

These factual findings by the master were specifically approved by the district court (R. 1776-7).

On June 27, 1940, the City had cancelled $144,198.98 of refunding bonds to comply with section 12 of the plan, and on June 30, 1941, it cancelled an additional $50,818.00 of refunding bonds (R. 1641, 1249).

Since the institution of his proceeding the City has exchanged with two additional creditors old bonds and cou-

pons for refunding securities of the aggregate face value of $6,830.00. These exchanges were made in August and November of 1940 (R. 1469, 1315).

The City has, since the year 1937, levied debt service taxes according to the requirements of the plan (R. 1530, 842, 1607, 880, 1613, 881, 1618, 881). The master found, and the District Court affirmed his finding that these tax levies complied with the requirements of section 8 of the plan (R. 326, 328, 1773).

The City is holding in a special cash reserve moneys derived from the levy of the debt service taxes required under the plan, in the amount of $19,724.94 for interest accrued since January 1, 1937, on all refunding bonds authorized to be issued for all outstanding old bonds not heretofore placed in judgment, and in the amount of $2,794.91. for tax participation certificate reduction payments on all tax participation certificates authorized to be issued for such old bonds and coupons (R. 1655, 1301). No reserve is held for the unrefunded obligations in the six judgments because they were serviced continuously up to July 1, 1940, out of the special levies made for their benefit.

(2) Activities of Respondents in Coral Gables Refunding.

The testimony shows (R. 305-6) and the special master found (R. 329) that the coupons upon which the respondent American National Bank of Nashville, Tennessee, filed its claim are the propery of Ed. C. Wright, respondent, and that the Bank holds the coupons as pledges to secure the payment of a loan to Wright (R. 305-320). Wright did not include in his claim the coupons held by the Bank (R. 128).

In 1937 Ed. C. Wright, respondent, who is the only real objecting creditor who appealed from the interlocutory decree in his cause (R. 1835-6), was operating his municipal

bond business in Florida as Ed. C. Wright & Company, Inc., a Florida corporation owned by him (R. 128). He held $41,000.00 par value of past due old bonds of the City, upon which interest as of January 1, 1937, was also past due in the amount of $12,780.00, and sold these bonds and coupons to the City on November 11, 1938 (R. 1523-4, 842). Wright did not think that he was selling them to some third party, as contended by his counsel in the circuit court, because he offered no such testimony, and he knew that the sale was made through the influence of the City (R. 1274-8). He got his price for the bonds, which was 64% of the face amount of the old bonds. Other smaller blocks of old bonds, most of them past due but some with future maturities, were purchased by the City about the same time at prices ranging from 37% to 60% of the principal amount of the bonds. These are the purchases made by the City between October 18, 1937, and December 15, 1938 (R. 1521-8, 842), and which were hereinabove referred to. All these purchases were made by the City from funds not pledged for the servicing of the refunding securities.

When Wright negotiated the above mentioned sale of his City of Coral Gables bonds he made a gentleman's agreement with the City's representative that if the City "was successful in getting him his price for his bonds that he would help us (the City) in any way consistent with his own affairs in persuading such customers who held city bonds to bring them into our plan" (R. 1276-7). Later however, Wright became very active in purchasing old bonds and coupons of the City, so active in fact that he forced up the price at which the City might have purchased these securities if it had not been for his active participation in the market buying them (R. 1383-4).

The respondent, American National Bank, in the summer of 1938, made a loan to Ed. C. Wright & Company, Inc.

and accepted as collateral to secure the same $225,000.00 face amount of Coral Gables bonds with coupons attached, other detached Coral Gables coupons, and other Florida municipals, in an amount which the Bank refused to disclose in the evidence (R. 1164, 308). Under the collateral agreement executed by Wright, and on the face of the notes executed by him, the Bank was under no obligation to return any of the said collateral to Wright until the notes had been paid in full and under no obligation itself to take any steps or institute any legal proceedings either to protect the collateral or collect what was due and owing on the collateral (R. 305-320).

Albert Roberts, Jr., an officer of Wright's corporation, but not associated with him at the time the petition in bankruptcy was filed, conducted negotiations with City officials in an effort to work out a scheme for the payment in full of Wright's bonds and coupons. These negotiations began the latter part of 1937 or the early part of 1938. In August of 1939, Roberts attempted to negotiate a contract with the City which would have obligated the City not to institute bankruptcy proceedings for the completion of its refunding and which would have obligated Wright not to institute suit against the City on the bonds and coupons held by him in the principal amount of $252,000.00, together with matured coupons aggregating approximately $115,000.00. The agreement was to have remained in force and effect from its date to the 15th day of July, 1940—just 15 days after the then expiration date of the Municipal Bankruptcy Law. The City did not complete the execution and delivery of the proposed contract. Under its terms the City would have been obligated, during the period of the contract, to purchase certain of the matured coupons held by Wright at two-thirds of their face value, but the contract provided no plan for the settlement of the bonds (R. 1089-1095, 1631-2).

Failing in this attempt to stall the City along beyond the time when the Bankruptcy Act would expire and the City could not institute bankruptcy proceedings, and, at the same time, to secure substantial payments on their coupons at the rate of two-thirds their face value, Wright, the Bank, and Roberts prepared themselves for action which they apparently thought would force the City to deal on their terms. On December 19, 1939, their representatives came to the City for a conference with the City Commission, but no definite action was taken, and there was no definite indication that there was any reasonable prospect of the City taking action which would be agreeable to the Wright interests (R. 1100-4, 1288-9). The Bank, unknown to the City of Coral Gables or its officials or attorneys, had already prepared and had ready for filing (R. 1109) a petition for an alternative writ of mandamus to compel the City to pay all of the past due coupons held by it in the aggregate amount of $95,825.00 out of the Issue of January 1, 1937 Fund, being the proceeds of tax collections for the purpose of servicing the refunding bonds and tax participation certificates of the January 1, 1937 Issue. When the conference with the City Commission did not go as the representatives of Wright's group hoped it would, they filed their petition and the alternative writ of mandamus was issued on December 20, 1939, and served on the City (R. 1437-1468, 993). If the City had not already forwarded moneys for the payment of the refunding interest coupons due January 1, 1940, to its paying agent in New York prior to the service of the alternative writ of mandamus, this step by the Bank for Wright and his associates would have put the City in the embarrassing situation of having to execute a contract with Wright or of defaulting in its interest payments on January 1, 1940 (R. 423-4). This illustrates the extent to which Wright and the Bank went in order to try to force the City to prefer them over other creditors. If their suit

had succeeded in preventing the payment of the interest due on the refunding bonds in the hands of the other creditors on January 1, 1940, they would have wrecked the newly established credit of the City of Coral Gables or forced the City to give them the preference they sought.

After the institution of this mandamus suit by the Bank, the City gave up hope of any friendly adjustment of its differences with Wright and his associates and prepared to file its petition for the confirmation of its plan of composition before the expiration of the Municipal Bankruptcy Law which was then due to expire on June 30, 1940. On March 5, 1940, the City adopted Resolution No. 347, authorizing the institution of this bankruptcy proceeding (R. 108-110). On June 12, 1940, pursuant to instructions by Wright, the American National Bank of Nashville, Tennessee, with full knowledge of the refunding plan and proposed bankruptcy proceeding, voluntarily redelivered to Wright the $225,000.00 worth of Coral Gables bonds and all of the coupons held as collateral by it except coupons in the face amount of $84,282.50, each of which matured prior to June 15, 1940 (R. 308). The said Bank then came into this proceeding and objected to the plan, alleging that it discriminated unfairly against the Bank as the holder of only coupons (R. 145, 153-4).

When the City adopted Ordinance No. 347 authorizing the institution of these proceedings, the only creditors of the City holding unrefunded bonds and judgments, who were known to the City, were the six judgment creditors above mentioned, and respondents Wright and the Bank, who held $252,000.00 face amount of bonds with $115,000.00 of accumulated coupons and interest. The total outstanding unrefunded old bonds at that time were in the principal amount of $326,000.00, and the City did not know who held the $74,000.00 of said bonds not owned by Wright (R. 18, 19, 21-40).

(3) Changed Conditions.

Between the time the City placed in effect its voluntary plan of refunding in September, 1937, and the time of the filing of the petition in this cause, June, 1940, many things had happened and in a number of respects there were "changed conditions", as said by the circuit court.

These changed conditions, however, were brought about by the abnegations and sacrifices voluntarily accepted by the 90% of accepting creditors and by the financial transactions of the City in which, with funds not pledged to the servicing of its refunding securities, it acquired indebtedness, the active enforcement of which was threatening to destroy the benefits of the partial refunding.

These changed conditions did not deplete the assets pledged to the servicing of the City's refunding securities, but on the other hand improved the assets in that they improved the future tax collecting power of the City. These changed conditions did not give to the consenting creditors any advantage or thing of value which did not also accrue to the respondents. The result of the changed conditions was a general improvement in the financial condition of the City and affected the interests of the consenting creditors in the same manner and degree as they affected the interests of the respondents. The financial transactions of the City contributing to these changed conditions were all necessary steps leading toward the completion of its plan of refunding.

The outstanding changed conditions affecting the City's bonded obligations, both refunded and unrefunded, are the following:

(1) On October 10, 1937, the City sold, as was contemplated under section 12 of Ordinance No. 269, for a cash consideration of $457,691.01 delinquent tax assets held by it on taxes for the year 1936 and prior years, the proceeds from

which were not pledged to the servicing of the refunding securities (R. 87-9, 1517-8, 842).

(2) The proceeds from the said sale were used by the City (a) to pay the entire expenses of the voluntary refunding in an amount equal to 1.236% of the total fixed debt; (b) to purchase old bonds and coupons and judgments on old bonds and coupons for an average price substantially less than 50% of the total amount due upon the obligations; and (c) to purchase refunding bonds at an average of less than 50% of their par value (R. 1517-8, 842). These purchases were made between October 18, 1937, and December 15, 1938 (R. 1521-9, 842).

(3) The City also purchased with general funds and trust funds, neither of which were pledged to the servicing of its refunding securities, other judgments and old bonds and coupons and refunding bonds. The purchases with trust funds were made between September 17, 1936, and December 15, 1939, excepting two small items in January and May, 1940. The purchases with the general funds were made in March, 1939 (R. 1521-9, 842).

(4) As a result of the aforesaid purchases the City held $479,198.98 par value of its refunding bonds which it allocated and set aside to meet the special retirement schedule in section 12, and $234,746.92 face value of its tax participation certificates (R. 826-8, 1929, 842).

(5) The City, from the refunding bonds so acquired and held by it, had retired and cancelled $144,064.58 of refunding bonds as required under section 12 of said ordinance (R. 1641, 1249).

(6) The City reduced the amount of its indebtedness affected by the plan by the payment of some of it from the proceeds of special earmarked tax levies made pursuant to

the requirement of six existing peremptory writs of mandamus issued out of the District Court of the United States (R. 1628, Deft. Ex. 29, 959).

(7) New homes and other buildings had been constructed in the City because of the confidence of the public in the future of the City after the refunding of its bonds. These buildings increased the total assessed valuation to amounts above those anticipated by the City when it worked out its plan of refunding, but the said growth was still far short of sufficient to reasonably anticipate the payment of the tax participation certificates in full (R. 1643, 1651, 1301).

(8) There has been a corresponding increase in population, the Federal Census for 1940 showing 8,294 population, which growth exceeded the anticipated growth of the City by only a fraction of 1% (R. 1643, 1655, 1301).

(9) Tax collections had improved and the amount of money paid into the Tax Participation Certificate Fund and disbursed on a pro rata basis to the outstanding certificate holders and held for certificates authorized to be issued was in excess of the amounts anticipated at the time the plan was placed in effect (R. 1643, 1653-4, 1301).

(10) The City, through its purchase of judgments on old bonds and coupons upon which peremptory writs of mandamus had issued requiring the payment of the same over periods of six and twelve years, had reduced the amount of special earmarked debt service taxes required of it by the writs of the United States District Court (R. 1530, 842); and through its purchase of old mature bonds and coupons had forestalled other judgments and peremptory writs of mandamus which would have materially increased the amount of special earmarked debt service taxes.

(11) The City had, by reducing its operation tax levy, maintained a total tax rate of 22 mills for debt service and

operations, despite the fact that debt service tax levies required under the plan and under peremptory writs of mandamus were in excess of the total tax levy anticipated to be required for the servicing of the full amount of refunding securities authorized to be issued under the plan (R. 1530, 842).

(12) While the record does not show whether consenting creditors were the individuals who exchanged their old bonds, it is a fair inference that the holders of the refunding bonds and tax participation certificates, who consented in the bankruptcy proceeding, were in the main the same individuals who held the old bonds and voluntarily exchanged them for refunding securities.

(13) The market value of the refunding bonds had risen from 45½ cents on the dollar in October, 1937 (R. 1640, 1216), to 66 cents on the dollar in March, 1939 (R. 1521, 1528, 842), and to 91 or 92 cents on the dollar in June, 1941 (R. 1150-1). Respondent Wright, with full knowledge of the refunding plan, had bought in the open market, some time prior to September, 1938, $225,000.00 par amount of old bonds, and prior to August, 1939, he acquired an additional $27,000.00 of old bonds. He acquired with said bonds approximately $115,000.00 par value of matured coupons (R. 308, 1524, 842, 1383-4, 1631, 1095). These purchases were made by Wright despite his "gentleman's agreement" above referred to.

(14) From the proceeds of the tax levies made pursuant to the plan the City had set aside in a special fund moneys to pay accrued interest and accrued liquidation dividends on all refunding bonds and tax participation certificates authorized to be issued to the holders of unrefunded bonds and coupons which were not included in the six judgments (R. 1643, 1655, 1301).

Argument of Law.

In arguing the assignments of error we have consolidated them into four divisions for the sake of brevity.

I. The Circuit Court misinterpreted the purpose of Subsection 83(j) of the Municipal Bankruptcy Act and the effect which should be given to it in the instant case.

(Errors No. 4 and 7)

In seeking the proper interpretation and application of subsection 83(j) we should look first to other provisions of the Municipal Bankruptcy Act and the history of the enactment of this additional subsection.

The first section of the Municipal Bankruptcy Act (sec. 81) confers jurisdiction in the following words:

> "Courts of bankruptcy shall exercise original jurisdiction as provided in this chapter for the composition of indebtedness of, or authorized by, any of the taxing agencies or instrumentalities hereinafter named, payable (a) out of assessments or taxes, or both, levied against and constituting liens upon property in any of said taxing agencies or instrumentalities, or * * *".

The indebtedness sought to be composed in the instant case is payable out of ad valorum taxes levied against and constituting liens upon taxable property under the jurisdiction of the City.

The act contains the following definition:

> "The term 'security' shall include bonds, notes, judgments, claims and demands, liquidated or unliquidated, and other evidences of indebtedness, either secured or unsecured, and certificates of beneficial interest in property." Sec. 82.

The judge is required to classify the creditors according to the nature of their respective claims and interests with

the following specific instructions as to the basis of classification, to wit:

> "Provided however, That the holders of all claims, *regardless of the manner in which they are evidenced*, which are payable without preference out of funds derived from the same source or sources, shall be of one class, the holders of claims for the payment of which specific property or revenues are pledged or which are otherwise given preference as provided by law, shall accordingly constitute a separate class or classes of creditors." Emphasis ours. (Sec. 83(b)).

Prior to the addition of subsection (j) to the Municipal Bankruptcy Act, the City of West Palm Beach put into effect a refunding plan and actually exchanged refunding securities for old securities with a large majority of the creditors of the city. After so partially completing its plan of refunding, the city filed a petition for the composition of all of its indebtedness, refunded and unrefunded, under the refunding plan as a plan of composition in bankruptcy. The petition was dismissed by the District Court, and on appeal in *Re City of West Palm Beach, 5 Cir., 96 2d 85,* it was held that a creditor who has irrevocably consented to a refunding plan by exchanging his old securities for refunding securities has placed himself in a different class from the non-consenting creditors who did not accept the plan, and that consents by such holders of refunding securities cannot be counted in determining the statutory majority required for confirmation of a plan of composition. In reaching this conclusion, the court said:

> "In bankruptcy matters composition has a special meaning, to wit, a settlement or adjustment which is enforced by the court on all creditors after its acceptance by a required majority. A proposed adjustment out of court is not a plan of composition, but it may become one by being presented to the court."

After this decision, and as a result thereof, Congress added subsection 83(j) to the Municipal Bankruptcy Act for the purpose of avoiding the effect of this decision. This subsection has been held effective to meet and provide a remedy for the situation resulting from the said decision in the City of West Palm Beach case.

West Coast Life Ins. Co. v. *Merced Irr. Dist.*, 114 F. 2d 654, 667-8, certiorari denied, 311 U. S. 718, 85 L. Ed. 467, 61 S. C. 441; and

American National Bank of Nashville, Tennessee v. *City of Sanford, Florida*, 5 Cir., 112 F. 2d 435, certiorari denied, 311 U. S. 677, 85 L. Ed. 436, 61 S. C. 45.

The only change, modification or amendment of the Municipal Bankruptcy Act by subsection 83(j) is the modification of the provision of the Act in section 83(b), quoted above, relating to the classification of creditors. The effect of the addition of the subdivision is that refunding securities issued under a plan of refunding are still indebtedness of the city and that such indebtedness is to be placed by the court in the same class with unrefunded bonds in carrying out the provisions of the Act.

In the *Henderson County, North Carolina*, case there had been a partial refunding and the question was presented to the court upon what basis the consents based upon refunding securities should be counted. It was held that consents by holders of refunding bonds who had agreed to both a first and second plan (of which the first was uncompleted and the second, also uncompleted, was before the court) were to be counted on the basis of their original claims unmodified by either consent.

Ouerbacker v. *Henderson County*, 4 Cir., 126 F. 2d 309, certiorari denied, 317 U. S. 654, 87 L. Ed. 40 63 S. C. 51.

In the *Imperial Irrigation District* case there had been a partial refunding under a 1932 plan and then a subsequent plan, known as the 1939 plan, was submitted to the court as the plan of composition. The validity of consents by bondholders who had previously consented to the plan of 1932 and accepted refunding bonds thereunder as consents to the 1939 plan of composition submitted in the proceeding was attacked. The court held that under subsection 83(j) the consents of holders of refunding bonds under the 1932 plan were entitled to be counted in determining the statutory required majority for the confirmation of the plan. It further held that the 1932 refunding bonds should be counted on the basis of the old obligations which they represented.

The court said that they would paraphrase subsection (j) thus:

> "The partial completion of any plan as outlined in the petition, whether partial completion of such plan as outlined in the petition was before or after filing, shall not limit the effect of this title, and holders of securities under *any partial completion of any plan* may be included as consenting creditors to such plan as is outlined in the petition." (Emphasis ours.)
>
> *Wells Fargo Bank & Union T. Co.* v. *Imperial Irr. Dist., et al.*, 9 Cir., 136 F. 2d 539, 547-8 (petition for certiorari pending in the Supreme Court).

This interpretation of subsection (j) is in keeping with the above quoted portions of sections 81, 82 and 83 of the Municipal Bankruptcy Act and in keeping with the purpose of the enactment of said subsection (j). The Act confers jurisdiction on a bankruptcy court for the composition of indebtedness of municipalities. Refunding bonds and old bonds are both indebtedness. The Act specifically prescribes that the classification of claims upon such indebtedness shall be made "regardless of the manner in which they (claims) are evidenced." The sole basis of classification is the source

or sources from which the funds are derived for the payment of the claims, and subsection (j) specifically provides that the fact that some creditors hold refunding securities and other creditors hold unrefunded securities does not place them in a different class so long as the two types of securities are payable from the same source or sources.

In the *City of Sanford* case the constitutionality of subsection (j) was sustained on the theory that the non-consenting creditors had no vested right to prevent the city and the holders of refunding bonds from revoking the refunding and restoring the bonded indebtedness to its original form, and that when "So viewed, the amendment is brought directly within the principle on which compositions, both private and public, have been affirmed as valid, that where a sufficient number of those similarly situated with regard to the composition have approved it, no one's rights can be or have been, constitutionally impaired." (112 F. 2d 437).

The court also expressed the view which has been affirmed in numerous decisions, that the Municipal Bankruptcy Act was valid and constitutional where the voluntary plan of refunding had been accepted by the required majority but not yet executed and that those who had contracted to accept the refunding securities could be counted in the compulsory plan should a petition for composition be filed, and then said,

> "It is difficult to see how appellant's rights are any more vested, by the taking of the refunding, in lieu of the original bonds, than they would be if there were only an agreement to take them " (112 F. 2d 438).

This reasoning in holding subsection (j) valid and constitutional is also applicable to the subsection as interpreted and applied in the *Ouerbacker* v. *Henderson County,* and the *Wells Fargo* v. *Imperial Irr. Dist.* decisions, cited above.

As said in the *Wells Fargo* opinion (136 F. 2d 548), the purpose of section 83(j) is defeated if it is interpreted to mean that the only change in a creditor's status which will be disregarded in a proceeding in bankruptcy for the confirmation of a plan of composition is one resulting from his consent to and exchange of securities under the very plan of composition before the court.

The purpose of subsection 83(j) as interpreted and applied in the above mentioned decisions is to permit a creditor of a taxing agency who has irrevocably consented to a plan of refunding by exchanging his old securities for refunding securities to, nevertheless, be classified with holders of old unrefunded securities and to vote his consent in a bankruptcy proceeding offering a plan of composition of all of the debts of the taxing agency, refunded and unrefunded, whether or not the plan of composition offered in the bankruptcy proceeding is identical with the plan of refunding theretofore accepted by such holder of refunding securities.

Stated in another way, the purpose of subsection (j) is to prevent creditors who have refused to accept voluntarily a plan of refunding from reaping an unfair advantage over accepting creditors and from capitalizing on the improved financial conditions of the taxing agency resulting from the abnegations and sacrifices voluntarily accepted by the creditors who agreed to the plan of refunding and accepted the refunding securities offered under the same.

So long as any of the debts of a taxing agency affected by a plan of refunding are outstanding (that is, not "owned, held or controlled" by the city) and not refunded, such an agency may under subsection 83(j) file a petition in bankruptcy for confirmation of a plan of composition of all of its debts, and its creditors, who have accepted refunding securities under any prior plan of refunding belong in the same class with creditors holding unrefunded securities,

and such holders of refunding securities may vote and consent to the plan of composition whether or not the plan of composition is identical with the plan of refunding theretofore accepted by the holders of refunding securities provided such consenting creditors upon the confirmation of the plan will receive no advantage and no preference over objecting creditors as a result of the confirmation of the plan.

Ouerbacker v. *Henderson County, supra;*
Wells Fargo Bank & Union T. Co. v. *Imperial Irr. Dist., supra.*

The test of whether a city may proceed under subsection 83(j) is whether consenting creditors who hold refunding securities have received or will receive as a result of the confirmation of the plan an advantage or preference over the objecting creditors, which advantage or preference offers an inducement to the consenting creditors to file their consents for the purpose of forcing the objecting creditors to take less than the consenting creditors have received or may receive. It is immaterial whether the claim of the consenting creditor is evidenced by a refunding security or evidenced by an obligation in its original form. The material, essential element under the Municipal Bankruptcy Act is whether the claims are payable without preference out of funds derived from the same source or sources.

American United Mutual Life Ins. Co. v. *City of Avon Park,* 311 U. S. 138, 61 S. C. 157, 85 L. Ed. 91;
Kaufman County Levee Imp. Dist. No. 4 v. *Mitchell,* 5 Cir., 116 F. 2d 959;
Town of Belleair, Fla. v. *Groves,* 5 Cir., 132 F. 2d 542, certiorari denied, 87 L. Ed. 623, 63 S. C. 762.

Special treatment by a city of some of its former creditors or treatment different from that offered in a plan of

composition under which it acquires ownership or control of some of its debts affected by the plan more than a year prior to filing a petition in bankruptcy is objectionable and vitiates the plan only when such treatment results in depleting the assets available for other creditors and when it results in allowing the consenting creditors who file acceptances to the plan to receive, as a result of the confirmation thereof, a preference over and above that which the dissenting creditors will receive under the plan.

American United Mutual Life Ins. Co. v. *City of Avon Park, supra;*

Evergreen Farms Co. v. *Willacy Co. Water Control Imp. Dist.*, 5 Cir., 124 F. 2d 1;

and other cases cited above.

In the instant case there are only two factual differences from the situation presented to the court in the *City of Sanford, supra,* case. They are (a) that after the voluntary refunding was partially completed and more than a year prior to filing the petition the City acquired some of its old bonds and judgments on old bonds with funds not pledged to the servicing and payment of refunding securities; and (b) that the City, under the lawful compulsion of peremptory writs of mandamus, serviced six judgments against it out of the proceeds from special earmarked tax levies.

These facts do not relate in any manner to the subject matter dealt with by subsection 83(j) of the Municipal Bankruptcy Act. The former creditors who sold their claims to the City were not creditors at the time the petition was filed and had not been creditors for over one year. The judgment creditors are not creditors consenting to the confirmation of the plan.

In the majority opinion of the Circuit Court the Judges apparently considered these factual differences as facts sus-

taining the contention of respondents that the plan submitted to the court was not a partially completed plan within the meaning of section 83(j). If these facts constitute a violation of any other provision of the Municipal Bankruptcy Act, then the holding of the Circuit Court might be correct. The Circuit Court in its majority opinion does not point out wherein these facts constitute a violation of any provision of the Municipal Bankruptcy Act and the City insists that they do not.

In the *El Dorado Irrigation District* case, the District, more than a year prior to the filing of the petition, paid one creditor's claim on the basis of 82½% of the amount of the claim and the plan of composition submitted to the court provided for paying the creditors 50½% of the amounts of their claims. The court held, however, that if such payment was a preference payment it occurred more than a year before the filing of the petition being considered and, therefore, would not constitute a preference under the bankruptcy statute. 11 U. S. C. A., section 96.

Thomas v. *El Dorado Irr. Dist.*, 9 Cir., 126 F. (2d) 922, certiorari denied, 317 U. S. 660, 87 L. Ed. 42, 63 S. C. 59.

Another reason why these purchases or settlements should not have been so considered by the Circuit Court is that at the time of filing the petition the creditors from whom the bonds and judgments were purchased were not creditors of the City and the obligations formerly held by them were not outstanding existing debts of the City. In the *Provident Irrigation District* case the confirmation of a plan was opposed on the ground that some creditors, who were not entitled to payment under the California law, were by error paid in full prior to the filing of the petition, although neither the District nor any *present creditor* in any

way benefited from the error. The court held that the fairness of the plan was not to be so gauged, and said:

> "The Bankruptcy Act places on a basis of equality all existing creditors whose claims are payable from the same source, and in the event of bankruptcy the bonds of the district of whatever maturity, and whether they have been registered or not, are on parity."
>
> *Taylor* v. *Provident Irr. Dist.*, 9 Cir., 123 F. (2d) 965, certiorari denied. 315 U. S. 821, 86 L. Ed. 1217, 62 S. C. 914,

Some of the bonds and judgments purchased by the City were debts owned, held and controlled by the City at the time of filing the petition. The Act specifically contemplates that this situation may exist as it provides in subsection 83(d) that "claims owned, held or controlled by the petitioner" shall be excluded from the counting of consenting creditors.

We have pointed out in the Statement of Facts and in the argument below that these two factual situations do not prejudice the rights and interests of respondents when their situation is considered in contrast with the situation of the consenting creditors.

II. The plan of composition was offered and accepted in good faith.

(Errors No. 1 and 4)

The Municipal Bankruptcy Act, section 83(e), 11 U. S. C. A. 403(e), provides that the judge shall make written findings of fact and his conclusions of law and shall enter an interlocutory decree confirming the plan, if satisfied that "(5) the offer of the plan and its acceptance are in good faith." Section 82, however, does not prescribe what constitutes good faith, on the part of either the petitioner or those accepting the plan.

The Circuit Court, in its decision, takes the novel position that the City (petitioner), by requesting the holders of its refunding securities to consent, first to the filing of the petition, and later to the confirmation of the plan, and the creditors, by so consenting, were not acting in good faith—"legal good faith" so the opinion says—because this action by both the City and the bondholders was for the purpose of "bludgeoning into submission" the non-consenting creditors with whom the City had not been able to make settlements satisfactory to itself (R. 1867-8).

Such a holding, undisturbed, on the part of the Circuit Court so circumscribes and limits the activities of a taxing unit to solicit consents as to becloud and make uncertain future efforts of taxing agencies seeking to compel a refunding previously partially completed.

In the municipal bankruptcy cases previously decided, where charges of lack of good faith have been successfully interposed as defenses to the confirmation of a plan, there has been no such holding by this Court or by any of the district or circuit courts. In the decided cases the element of fact that has prevented the courts from approving the plans has been that the petitioner in bankruptcy, by contract or otherwise, affords to the consenting creditors a more advantageous position than that accorded the non-consenting creditors.

American United Mutual Life Ins. Co. v. *City of Avon Park,* 311 U. S. 138, 61 S. C. 157, 85 L. Ed. 91;

Kaufman County Levee Imp. Dist. No. 4 v. *Mitchell,* 5 Cir., 116 F. (2d) 959;

Town of Belleair, Fla. v. *Groves,* 5 Cir., 132 F. (2d) 542, certiorari denied, 318 U. S. 769, 87 L. Ed. 623, 63 S. C. 762.

That a similar element of fact does not exist in the instant case is shown hereinbelow in our argument on the proposi-

tion that there is no lack of identity of interest of those consenting with those compelled by their consents to accept the plan.

Good faith in filing a petition imports an honest intention on the part of the petitioner to effect a refunding of its financial affairs together with a need for a possibility of effecting it. These elements are not lacking in the instant case.

Snyder v. *Fenner*, 3 Cir., 101 F. (2d) 736;
Tenn. Pub. Co. v. *American Nat. Bank of Nashville, Tenn.*, 299 U. S. 18, 81 L. Ed. 13, 57 S. C. 85.

Charges of lack of good faith, or in other words, of bad faith, in the offer and acceptance of a plan of composition, have been made in other municipal bankruptcy cases, as shown below, in which the courts have held that the alleged derelictions of the taxing agencies were not sufficient to justify the court in refusing to confirm the plan.

In the *Merced Irrigation District* case the District was charged with bad faith because it diverted $320,272.00 from the bond fund. The court found that this transfer might have been in the face of bondholders' rights but that every such error does not preclude the success of a composition, and said,

> "It is quite evident that the proprotionate amount of this sum to which the dissenting bondholders would be entitled would be comparatively small."
>
> *West Coast Life Ins. Co.* v. *Merced Irr. Dist.*, 114 F. (2d) 654, 670, certiorari denied, 311 U. S. 718, 85 L. Ed. 467, 61 S. C. 441.

In the *Henderson County, North Carolina,* case, the County was charged with bad faith because during a period of default of the County on its bonds it had purchased $132,000.00 in amount of bonds at a cost of $74,238.55 *from*

bondholders who were consenting to the plan of composition. It was contended that this fact invalidated the consents given to the plan by the sellers of the bonds. The record in the case did not give the dates or prices or other details of the transactions which were in the possession of the objecting creditors and the court held in view of these facts that the charge was unworthy of further consideration.

Ouerbacker v. *Henderson County*, 4 Cir., 126 F. (2d) 309, 315, certiorari denied, 317 U. S. 654, 87 L. Ed. 40, 63 S. C. 51.

In the instant case complaint is made of the fact that the City purchased certain of its unrefunded bond obligations, but it is not contended that these purchases were made from any of the creditors who are consenting and agreeing to the confirmation of this plan of composition. None of these purchases were made from consenting creditors.

In the *El Dorado Irrigation District* case it appeared that more than a year before the filing of the petition under consideration the District had paid to one creditor a sum equivalent to 82½% of the principal and interest due on his claim, and the plan of composition submitted to the court provided for the payment of only 50½% of the principal and interest due. The court held that even if the payment of 82½% to one creditor was a preference payment it occurred more than a year before the filing of the petition under consideration and therefore would not constitute a preference under the statute. 11 U. S. C. A., section 96.

Thomas v. *El Dorado Irr. Dist.*, 9 Cir., 126 F. 2d 922, certiorari denied, 317 U. S. 660, 87 L. Ed. 42, 63 S. C. 59.

In the *Edinburg C. I. School District* case, the District was charged with bad faith in that it had been delinquent in its duty in assessing property and taking steps to collect

taxes, and these facts were apparently proven but the court held that they were not sufficient to support the charge of bad faith against the District, and said,

> "The case presented practical business problems to be decided on equitable grounds rather than legal technicalities."
>
> *Getz* v. *Edinburg C. I. School Dist.*, 5 Cir., 101 F. 2d 734.

The Circuit Court in the instant case condemns the petitioner for its persistent correspondence with its creditors (R. 1863, 1868). The record discloses that the outstanding bonded indebtedness of the City of Coral Gables ran into millions of dollars and that the number of its creditors ran into hundreds, and that they were scattered from coast to coast. Careful examination and consideration of the two letters complained of (R. 1573-7, Deft. Ex. 21, 876) does not warrant the condemnatory expression of the court that the City and its creditors were "bludgeoning into submission" the non-consenting creditors.

The respondent Wright (recalcitrant and non-cooperative bondholder) purchased his bonds after the plan had been approved by and exchanges carried out with more than 90% of the creditors, and when Wright well knew the terms of the plan of composition, and was aware of the existence of the Municipal Bankruptcy Act (R. 1276-7, 1383-4, 1631-4, 1095).

The master in his findings (R. 325), and the district judge in his order (R. 1773) found no such wrong-doing on the part of the City, but they did find that the City for many years had been endeavoring to extricate itself from the financial chaos brought about by the Florida boom and subsequent deflation and the inability of the City to meet its obligations as they matured. Since proceedings in bankruptcy are ruled by equitable considerations, the Circuit

Court evidently overlooked its own indictment of the respondents, charging them, for the second time, with creating artificial defenses to defeat the confirmation of the plan.

Roberts v. *Board of Public Instruction of Broward Co., Florida*, 5 Cir., 117 F 2d 943, certiorari denied, 313 U. S. 582, 85 L. Ed. 1539, 51 S. C. 1101.

It is to be noted that, as far as the ownership of the securities resisting the plan are concerned, Wright was the American National Bank of Nashville, Tennessee, and the Bank was Wright, and that Wright, the real owner, is entitled to no more consideration than the Bank (R. 305-17).

The court entirely overlooked and ignored the evidence in the record of the other activities and efforts of Wright and the Bank in trying to force the petitioner to deal with them on their terms, better and greater than those accorded the consenting creditors who had already exchanged. (See Activities of Respondents in Coral Gables Refunding, above).

The record discloses that Wright held negotiations with the City officials up to the very day of the filing of the petition (R. 1284); that Wright, in the summer of 1939, sought to have the City execute a contract with him to negotiate (no terms being agreed upon), the expiration date of which extended beyond the effective date of the then existing Municipal Bankruptcy Act (R. 1091-5, 1631-4, 1095); that on December 19, 1939, Wright and he Bank sought again to procure the execution of the said contract, and upon failure, Wright, through the Bank, on the coupons separately held by it as pledgee, sought to prevent the City from paying its interest on the refunding bonds by procuring an alternative writ of mandamus on December 20, 1939 (R. 1437, 993); and that Wright, prior to acquiring the bonds and coupons included in his claim and the above mentioned negotiations and litigation with the City, had made a gen-

tleman's agreement with a representative of the City to assist it in its refunding efforts (R. 1276-7). All of which conduct by Wright and the Bank shows that the respondents, appellants below, have brought themselves clearly within the class referred to many times in the decisions of the district courts and the circuit courts as a recalcitrant minority which has at all times sought to obstruct the plan and apparently would not be satisfied with any plan which would not offer them one hundred cents on the dollar, plus interest.

Ouerbacker v. *Henderson County*, supra;
Thomas v. *El Dorado Irr. Dist.*, supra;
Kelly v. *Everglades Drainage Dist.*, 5 Cir., 132 F. 2d 742;
Roberts v. *Board of Public Instruction of Broward Co., Florida*, supra.

Here, for the first time, we have objecting creditors resisting and opposing the plan from its inception being given complete relief and being permitted to reap an unjust enrichment at the expense of the more 90% of the creditors of the same class who have voluntarily accepted the plan.

Creditors who have purchased defaulted bonds during the progress of a refunding program for speculative purposes are not looked upon with favor; neither do they come into equity with clean hands.

Security-First Nat. Bank v. *Rindge*, 85 F. 2d 557, 86 F. 2d 3, certiorari denied, 299 U. S. 613, 57 S. C. 315, 107 A. L. R. 1249.

If this record shows a lack of good faith on the part of anyone, it is on the part of the respondents Wright and the bank, and not the City and the consenting creditors.

III. There is no lack of identity of interest of the creditors consenting in the instant case with the respondents who would be compelled by their consents to accept the plan of composition.

(Errors No. 2 and 6)

There are two elements in the identity of interest which in a bankruptcy proceeding for the composition of indebtedness must exist between consenting creditors and non-consenting creditors who will be compelled to accept the plan as a result of the consents. First, the source from which each group of creditors will receive something of value as a result of the confirmation of the plan must be the same. Second, the value of that which each group receives upon the completion of the plan of composition must be proportionately the same.

In the instant case the source is the same, to wit, the proceeds from future debt service taxes levied according to the requirements of the plan and the value of that which each group has and will receive from the distribution of the said proceeds according to the provisions of the plan is proportionately the same.

The consenting creditors, being the holders of refunding securities, have each received refunding bonds in the amount of 50% of the fact of their old bonds, and tax participation certificates in the amount of 50% of the face of their old bonds plus interest thereon accrued to January 1, 1937. No creditor upon exchanging his old bonds and coupons received anything of value excepting the refunding bonds with matured coupons detached and tax participation certificates authorized under the plan and a check in lieu of the matured detached coupons (R. 679-81, 683-4).

The consenting creditors have also received, as the coupons matured, interest payments on their refunding bonds

and liquidation dividends on their tax participation certificates in the amount of their pro rata share of the Tax Participation Certificate Fund (R. 1627, 1257). The objecting creditors will, upon the confirmation of the plan, receive refunding bonds and tax participation certificates in accordance with the provisions of the plan in the same proportionate amount as those received by the consenting creditors. They will also receive, upon the exchange of their old obligations for such refunding securities, all interest accrued on refunding bonds to the date of the exchange and all liquidation dividends on certificates accrued to the date of the exchange in the same proportionate amount as has been paid to the consenting creditors during the years the plan has been in effect (R. 1829-33). The City has in special reserves moneys for the payment of all accrued interest and liquidation dividends now due on all refunding bonds and tax participation certificates authorized to be issued to non-consenting creditors (R. 678, 1643, 1655, 1301, 1627, 1257). At the date of an exchange with non-consenting creditors they will be on an exact parity with the status of the consenting creditors as of that date.

The fact that consenting creditors have received as they accrued interest payments on their refunding bonds and liquidation dividends on their certificates sooner than the dissenting creditors will receive such payments does not constitute an unfairness or lack of mutuality of interest between the consenting and non-consenting creditors so as to bar the confirmation of a plan of composition.

Wells Fargo Bank & Union T. Co. v. *Imperial Irr. Dist., et al.* (April 28, 1943), 9 Cir., 136 F. (2d) 539, petition for certiorari pending.

As between respondent Wright and other consenting and non-consenting creditors there is a lack of identity of inter-

est, which places Wright in a preferential position. He sold some of his old bonds to the City and none of the consenting creditors did so. On November 11, 1938, Wright held $41,000.00 par value of past due old bonds of the City, upon which interest was due in the amount of $12,780.00 as of January 1, 1937, and approximately $16,639.00 as of November 10, 1938. He sold these bonds and coupons to the City for $26,240.00 cash, paid out of funds not pledged to the servicing of the refunding securities, which amount is 64% of the face amount of the bonds (R. 1523-4, 842). Other smaller blocks of old bonds, most of them past due but some with future maturities, were purchased by the City with funds not pledged to the servicing of refunding securities about the same time at prices ranging from 37% to 60% of the fact amount of the old bonds. These purchases were made by the City between October 18, 1937, and December 15, 1938 (R. 1521-8, 842).

Throughout these proceedings the respondent Wright has contended that the said purchases of old bonds, coupons and judgments by the City constituted preferential discriminatory treatment of some of the creditors of the City, and that because of these financial transactions on the part of the City it can not now avail itself of the benefits of the Municipal Bankruptcy Act to coerce him into accepting the refunding securities in exchange for the bonds and coupons now held by him. He has not contended and the record does not show that any of the consenting creditors in this proceeding sold any bonds, coupons or judgments to the City.

The consenting creditors have already voluntarily accepted the abnegations and sacrifices required by the plan, and upon confirmation of the plan in this proceeding the respondents and other non-consenting creditors will be required to accept the same abnegations and sacrifices. The

abnegations and sacrifices of each group of creditors upon confirmation of the plan will be identical.

In the *City of Sanford, Florida,* case the opinion was rendered on the pleadings, which presented the question of the validity of section 83 (j). The factual situation shown was that a large percentage of the creditors had voluntarily accepted refunding bonds and some had declined to accept them. The Circuit Court held that there was an identity of interest of the creditors who had accepted refunding securities and were consenting to the bankruptcy proceeding with that of the creditors who declined to refund their bonds.

> *American National Bank of Nashville, Tennessee* v. *City of Sanford, Florida,* 5 Cir., 112 F. (2d) 435, certiorari denied 311 U. S. 677, 85 L. Ed. 436, 61 S. C. 45.

Immediately after the voluntary refunding of over 90% in amount of the debts of the City of Coral Gables there was, under the authority of the *Sanford* case, an identity of interest between the two groups of creditors.

We have pointed out above in the Statement of Facts under the heading "Changed Conditions" all of the changes in the conditions of the City as of June, 1940, as compared to the conditions of the City in September, 1937, when it placed in effect the voluntary plan of refunding.

These changed conditions came about through the voluntary acceptance of the abnegations and sacrifices under the plan by the 90% of creditors who exchanged their bonds and as a result of the financial transactions of the City carried out by the use of funds not pledged to the servicing and payment of the refunding securities.

Each of these changes in condition of the City show an improvement of the City's financial affairs and an im-

provement in its ability to collect taxes in the future. None of these changed conditions benefited the consenting creditors more than they benefited the non-consenting creditors. These changed conditions did not deplete the assets pledged to the servicing of the City's refunding securities, but on the other hand improved these assets in that they improved the future tax collecting power of the City.

These changed conditions improved the value of the consenting creditors' refunding securities and at the same time, in the same manner and degree, improved the value of the refunding securities to which the dissenting creditors would be entitled upon confirmation of the plan.

No benefit or advantage has accrued to the consenting creditors as a result of these changed conditions which does not in the same manner and in the same degree accrue to the respondents and other dissenting creditors.

In decisions by this Court and the circuit courts denying to taxing agencies a confirmation of their plan of composition because of the lack of identity of interest of consenting creditors with non-consenting creditors, it has appeared that to confirm the plan of composition would constitute a fraud upon the dissenting creditors because the consenting creditors by their vote in favor of the confirmation of the plan would receive something of value which would not be received by dissenting creditors.

In the *City of Avon Park* case, it appeared that the consent of the fiscal agent to the confirmation of the plan was essential to procure the requisite two-thirds statutory vote and that as a result of the confirmation the fiscal agent would receive undisclosed benefits from the completion of the plan which would not be enjoyed by the dissenting creditors. It was this special interest of the fiscal agent in the completion of the plan which would not be enjoyed

by the dissenting creditors that destroyed the requisite identity of interest for the confirmation of the plan.

American United Mutual Life Ins. Co. v. *City of Avon Park*, 311 U. S. 138, 61 S. C. 157, 85 L. Ed. 91.

In the *Kaufman County Levee Imp. Dist. No. 4* case it appeared that the great majority of the consenting creditors were creditors of the District and also landowners in the District, and that by voting through the plan they would receive a benefit as landowners in exchange for their sacrifice as creditors and the court held that to so permit landowners to force creditors who were not landowners to accept the plan would be an unfair advantage accruing to the consenting creditors.

Kaufman County Levee Imp. Dist. No. 4 v. *Mitchell*, 5 Cir., 116 F. 2d 959.

In the *Town of Belleair* case a similar situation existed as that in the *Kaufman County* case, and the court denied the confirmation of the plan because the property-owning bondholders by consenting to the same would receive benefits above and apart from the surrender price proposed for their bonds in which the other bondholders would not participate and because such special benefits were substantial inducements toward their approval of the plan.

Town of Belleair, Fla. v. *Groves*, 5 Cir., 132 F. 2d 542, certiorari denied, — U. S. —, 87 L. Ed. 623, 63 S. C. 762.

In each of said cases, because of the lack of identity of interest between consenting and non-consenting creditors, the court held that to permit the consenting creditors to vote the plan of composition through, would constitute a fraud upon the non-consenting creditors because the consenting creditors would be voting to themselves something

of value which the non-consenting creditors would not receive.

In this case there is no such situation because nothing of value will accrue to the consenting creditors as a result of the confirmation of the plan which will not also accrue to the non-consenting creditors.

Respondents have contended in the lower courts that this petition was not presented and accepted in good faith because of the lack of identity of interest resulting from the fact that during the years of default on the part of the City it had made substantial payments on account of interest to the Barker Committee and had not paid equal amounts on account of interest to bondholders who had not deposited their bonds with the Committee.

As a matter of law in proceedings under the Municipal Bankruptcy Act for composition of indebtedness of a city it is not required that a plan provide for equalizing payments of interest made to some creditors prior to the effective date of the plan. It has been held that inequality in the amount of interest due to creditors at the time of refunding, because of prior payments to some, is not a sufficient lack of identity of interest to prevent the confirmation of a plan of composition.

Getz v. *Edinburg C. I. School Dist.*, 5 Cir., 101 F. 2d 734;
Taylor v. *Provident Irr. Dist.*, 9 Cir., 123 F. 2d 965, certiorari denied, 315 U. S. 821, 86 L. Ed. 1217, 62 S. C. 914;
Roberts v. *Board of Public Instruction of Broward Co.*, Florida, 5 Cir., 117 F. 2d 943, certiorari denied, 313 U. S. 582, 85 L. Ed. 1539, 61 S. C. 1101.

As a matter of fact, in this case there is no marked distinction between the amount of interest refunded on the bonds held by the Barker Committee and the amount of

interest refunded and claimed on the bonds held by other creditors. The interest claim submitted for exchange by the Barker Committee represented approximately 32.05% of the amount of the principal exchanged by the Committee. The percentage of interest to principal in the case of all exchanges made by bondholders other than the Barker Committee was 34.3% and the percentage of interest to principal of the entire refundable value of all outstanding bonds on January 1, 1937, was 33.25% (R. 855-6).

During the years 1930 to 1937 the Committee held almost 90% of the outstanding obligations of the City while it was receiving payments on account of coupons, and in September, 1937, when the refunding was made with the Committee, it held less than 50% of the outstanding debts (R. 676, 854-7). There is nothing in the record to show whether the bonds included in the claim of Respondent Wright were formerly held by the Barker Committee or not. The proofs of claim of Wright (R. 128) and the Bank (R. 132) however do show that their combined claim is for $253,000.00 on account of principal amount of bonds, and 23.38% of the said principal amount on account of interest due on the same up to January 1, 1937. The claims include interest to the date of filing the same, but to compare the amount of interest claimed on the Wright bonds to the amount of interest refunded on the Barker Committee bonds only interest on the Wright bonds to January 1, 1937, can be considered.

This claim of inequality on account of failure to equalize prior payments of interest to some creditors is not available to the respondents Wright and the Bank because as to them there is no inequality on this score as between them and any of the creditors consenting to the confirmation of the plan.

Under the facts in the instant case there is, therefore, no lack of identity of interest between creditors consenting to the confirmation of the plan and respondents and other creditors who will be compelled by such consents to accept the plan of composition.

IV. The findings of fact by the master and the District Court are amply supported by the record and should have been affirmed by the Circuit Court.

(Errors No. 3 and 5)

Specific findings of fact by a special master and the district judge should not be reversed by the appellate court unless such findings are clearly erroneous.

Rule 53(e) (2), Rules of Civil Procedure for the District Courts of the United States.

General Order 47, 11 U. S. C. A. 115, following section 53.

The Circuit Court in reversing the lower court based its opinion on its factual finding that the voluntary plan of refunding was completed in 1937 and that it was thereafter abandoned by the City long prior to the filing of the proceedings in bankruptcy (R. 1866). The evidence overwhelmingly supports the position of the City and the findings of fact by the master and the district judge to the effect that the plan was still open and was not a fully completed or abandoned one.

This error is so clearly pointed out by Justice Waller that we quote from his dissenting opinion:

> "Waller, Circuit Judge, concurring in part and dissenting in part:
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> • • • • • • •
>
> "The Special Master and the Court below found as a fact that the plan of composition of debts had not been

completed when ninety-odd per cent of the bondholders had accepted refunding bonds. I concur." (R. 1867).

* * * * * * *

"If the plan was completed in 1937 the Court would be without jurisdiction, otherwise the plan might yet be amended. It seems important, therefore, that the Court should carefully examine, or re-examine, its findings that the plan was fully completed rather than partially completed.

"The following considerations seem to sustain the conclusion that the plan was not a fully completed one, or an abandoned one, in 1937, or at any time prior to the filing of the petition herein:

"1. Only ninety-odd percent of the bonds were refunded in 1937 and the refunding plan would seem not to have been completed.

"2. Negotiations by the City, through Exselsen and others, continued without cessation to the date of the filing of the petition. (Negotiations between the City and Mr. Wright were in progress up to the very time of the filing of the petition in bankruptcy.)

"3. The idea of using the 'free funds' for the making of special settlements was a part of the plan, known and agreed to by the consenting creditors, and was designed for the purpose of trying to complete the plan, of which the special settlements were a part.

"4. The Special Master, after a full hearing of all the facts, found that the plan was not completed prior to the filing of the petition.

"5. The District Judge found that it was not a completed plan, and the evidence overwhelmingly supports the findings of the Master and the District Judge to this effect.

"6. Counsel for Mr. Wright in at least a dozen places in his brief refers to the voluntary plan as a 'partially completed plan' or a 'partially executed plan,' and I

fail to find any earnest contention on the part of counsel that the voluntary plan was a completed one.

"I recognize that if the premise of the majority that the voluntary plan was completed before bankruptcy was correct its conclusion would necessarily follow, but since the premise is supported by neither the law nor the facts the conclusion must fall." (R. 1870-71).

In the majority opinion, relative to this question of fact the court said:

"What is significant is that the City in 1937 completed and thereafter entirely abandoned the voluntary plan it had offered in 1936, and secured the acceptance of in 1937, and that the present proceeding is an entirely new proceeding and in no proper sense a completion of that plan." (R. 1866).

There is, therefore, a very serious conflict in the Court itself and between the appellate court and the trial court on this very important question.

The master, a lawyer of long and successful practice at the bar and who has been a master in many important cases, who gave much time to the taking of the testimony and consideration of the case, found as follows:

"I find from the evidence the following facts:

"That the Plan of Composition adopted in Ordinance 269, December 23, 1936, as amended by Ordinance 289, adopted September 4, 1937, was not completed because a small percentage of creditors did not accept the plan.

"That the document of December 24, 1936, the contract with the Barker Committee and the contract with Exselsen were all steps taken in a bona fide effort to bring about the acceptance of the Plan of Composition.

"That the continued exchanges of securities with certain creditors and settlements with other creditors were made in good faith in an effort to bring about the acceptance of the Plan of Composition.

"That the conduct of the City's representatives was pursued in the ordinary course of business without concealment or deceit, and with no purpose to withhold information" (R. 325-6).

• • • • • • •

"That the contract with Coral Gables Development Company was entered into in good faith as the best practical means of realizing on the City's delinquent assets derived under Section 12 of the Plan of Composition" (R. 326).

• • • • • • •

"The efforts of the City's representatives, by means of the document of December 24, 1936, the contract with the Barker Committee, the contract with Exselsen and by other means brought out in the evidence whereby they sought in good faith to carry out the City's Plan of Composition and avoid bankruptcy, did not vitiate the Plan of Composition" (R. 327).

The master in his report further said:

"Since the enactment of Sub-section J, municipalities are permitted by law to carry out a partially completed plan of composition even after the lapse of years.

"The petitioner was within its legal rights to postpone bankruptcy proceedings in the hope and effort to secure unanimous acceptance of its Plan of Composition" (R. 327).

Likewise, the district judge, after exceptions had been filed to the master's report and after lengthy arguments from both counsel for the respondents and the City, arrived at this conclusion:

"During the fall of 1937, and from time to time thereafter, various creditors of the City were dealt with and settlements were made with some creditors, and some of these creditors received larger percentages

of realization on their debts than other creditors who had accepted refunding bonds. But in all of the settlements, which were completed with cash payments, the record shows there was a good faith effort on the part of the City, and there was never a departure from the effort of the City to effect the proposed refunding settlement with all of its creditors. These special settlements can well be justified as consistent with the plan, (1) by reason of the pressing circumstances of litigation, and (2) the use of so-called free funds in the effecting of settlements. Also it is worthy of comment that the sanction of holders of refunding bonds was obtained, an unnecessary precaution unless the City was keeping in effect at all times the plan for settlement with all, either as a plan of settlement or with Subsection 'J' later enacted as a plan of composition. • • • The test to be applied, I hold, is whether the City relinquished its position as a debtor to make a settlement with all the creditors. Unequal amounts paid to some creditors resulted from pressure of litigation, and other justifiable causes, constituting not an inequality in the plan, but in an attempt to secure 100% acceptance, during all of which time the City had not departed from or given up its adopted plan of settlement" (R. 1777-8).

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"A very painstaking member of this Bar was appointed as Special Master in this case, and the report of testimony, his rulings, and his report indicate a very careful consideration of a very lengthy case. He has with great detail dealt with the various contentions of the parties, and I think his conclusions are correct in regard to the law and facts, and his report will be affirmed" (R. 1780).

(a) *The plan of refunding had not been carried to completion as such in 1937 by the acceptance of more than 90% which the plan required to make it effective.*

The provision in the contracts (R. 1477, 1514, 842) between the City of Coral Gables and its creditors, requiring

90% in amount to accept the same before it could be made effective, is similar to the provision requiring 75% in the *City of Homestead* plan. It was held in the case of *Davis v. City of Homestead*, 5 Cir., 112 F. 2d 438, certiorari denied, 311 U. S. 678, 85 L. Ed. 436, 61 S. C. 45, that such a provision was not one for closing the plan and taking no further consents after 75% in amount of acceptances had been obtained.

In the instant case the City has kept the plan open for execution with any creditors who would agree thereto, and after the institution of these proceedings it made voluntary exchanges with two more of its creditors (R. 1469, 1315).

(b-c) *When 90% had accepted the plan of refunding, it was not closed and abandoned as to the remaining non-consenting bondholders and this is not an entirely new proceeding.*

Undisputed facts in the record to support the factual findings of the Master, the District Court and Mr. Justice Waller on this proposition are:

(1) The City continued, without cessation to the date of filing the petition, to negotiate with its creditors in an effort to secure their acceptance of the refunding plan.

(2) Since the filing of the petition in this case the City has exchanged refunding securities for old bonds and coupons with two additional creditors (R. 1469, 1315).

(3) The City sold the delinquent tax assets reserved to it under section 12 of the plan as contemplated therein (R. 1517-8, 842), and used the proceeds from the sale to pay the expenses of the refunding and to purchase judgments and old bonds and coupons and refunding bonds (R. 1521-9, 842). These purchases were made in an attempt to prevent harmful tax rates and a disruption of the refunding

program, for the purpose of preserving and improving the future tax collecting power of the City, and for the purpose of anticipating the requirements of section 12 of the plan (R. 848).

(4) The City allocated to the cancellation schedule required in section 12 the refunding bonds acquired by it by means of the above-mentioned purchases (R. 828).

(5) The City made the tax levies required under the plan to service all of the refunding bonds and tax participation certificates authorized to be issued except those to refund the six judgments, which were being serviced by special earmarked tax levies required by peremptory writs of mandamus (R. 1530, 842).

(6) The City set up special cash reserves, derived from tax levies made under the plan, to pay all interest and all certificate reduction payments accrued since January 1, 1937, on all refunding bonds and tax participation certificates authorized to be issued excepting those to refund the six judgments (R. 1655, 1301).

(7) The City has on hand ready for delivery refunding bonds and tax participation certificates authorized to be issued in exchange for all unrefunded bonds and coupons (R. 1655, 1301).

(8) If the interlocutory decree in this case is executed the respondents will be required to accept in exchange for their bonds and coupons refunding bonds and tax participation certificates, and interest and reduction payments thereon, in the same proportionate amounts as have already been accepted by the consenting creditors.

(9) The City is, in this proceeding, seeking the aid of the bankruptcy court to compel the respondents to accept the same refunding securities it originally offered under the

voluntary refunding plan under changed conditions brought about by the voluntary abnegations and sacrifices of the consenting creditors, and by the financial transactions of the City, which did not deplete the assets of the City pledged under the refunding plan, and did not depreciate the value of the refunding securities offered under the plan, but, on the other hand, improved the future tax collecting power of the City (the assets pledged to the servicing of the refunding securities), and increased the value of the refunding securities. These changed conditions, as of the time of the filing of the petition in this cause, affect the rights and interests of the Respondents in exactly the same manner and degree as they affect the rights and interests of the consenting creditors.

(d) *When the voluntary plan was accepted in 1937 there was no express understanding that the City would not resort to bankruptcy.*

The Circuit Court, to sustain its view that the plan had been completed and abandoned by the City apparently gave weight to the following contention of appellants as stated in the opinion:

> "They point out that the voluntary plan had been accepted in 1937 under an express understanding that bankruptcy would not be resorted to, and that after it was completed by securing acceptance of at least 90 per cent, the City could then go about making voluntary and preferential settlements with other creditors" (R. 1864).

The record does not disclose any evidence to support the statement that the voluntary plan had been accepted in 1937 under any such express understanding that bankruptcy would not be resorted to. There was no such agreement with the creditors who voluntarily exchanged their bonds, nor with any other creditors. The possibility of the City

resorting to bankruptcy was anticipated in its agreement with Fiduciary Counsel, Inc. (R. 1715). On this point the Master did make a finding:

> "In the case of Fiduciary Counsel, Inc., it was agreed that if the City should resort to bankruptcy, the claim should be restored to its status quo ante" (R. 332).

But as to this agreement the Master further said:

> "I find as a matter of law that an agreement not to resort to bankruptcy is futile and unenforceable * * *" (R. 332).

We, therefore, insist that the factual findings upon which the Circuit Court premised its opinion are not supported by the record and that it does clearly appear from the record that the factual findings of the Master and the District Court are correct.

Conclusion.

For the above reasons we respectfully submit that the judgment and opinion of the Circuit Court should be reversed and the interlocutory decree of the District Court should be affirmed.

Respectfully submitted,

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Miami, Florida, January 12th, 1944.

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